STATE OF MICHIGAN

COURT OF APPEALS

COUNTY OF WAYNE, Charging Party-Appellant,	UNPUBLISHED March 22, 2011
v	No. 295536 MERC
AFSCME COUNCIL 25, AFSCME LOCAL 25, LOCAL 101, LOCAL 49 and LOCAL 1659, Respondents-Appellees.	LC Nos. 07-000050; 07-000051; 07-000052; 07-000053; 07-000054

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Charging party-appellant, county of Wayne (the county), appeals as of right from the order of the Michigan Employment Relations Commission (MERC), dismissing its unfair labor practices (ULP) charges. The charges were brought pursuant to the Public Employment Relations Act (PERA), against respondents-appellees, AFSCME Council 25 and AFSCME Locals 25, 101, 409, and 1659 (collectively, "respondents"). On appeal, the county argues that the MERC's decision must be reversed because it is based on improperly assumed facts and contains a substantial and material error of law, and that a remand is required because the county was denied the opportunity to present an oral argument on issues of law and policy. We affirm.

This appeal arises from the MERC's dismissal, upon the recommendation of an administrative law judge (ALJ), of ULP charges the county filed against respondents. The charges alleged that respondents were engaging in unfair labor practices in their conduct in connection with a breach of contract action filed in April 2007 in the Wayne Circuit Court (the circuit court action). The complaint in the circuit court action, which was initially brought by respondents and three individual plaintiffs and contemplated as a class action, alleged that the defendants, the county and the Wayne County Retirement Board, had violated the county's collective bargaining agreement with respondents and the vested rights of the individual plaintiffs, who are retired former county employees, by changing the premium structure for supplemental life insurance (SLI) benefits. The circuit court eventually removed respondents from the caption, thus dismissing them as parties, and limited the class of plaintiffs to "those

retired members of AFSCME Council 25, and its Locals 25, 101, 409 and 1659 who have purchased SLI." The three individual, named plaintiffs served as class representatives.[1]

In the instant MERC proceedings, the county alleged that respondents' conduct in filing and pursuing the circuit court action amounted to an unfair labor practice under the PERA:

> The Union/Labor Organization, in concert [with] affiliate locals and private individuals, filed a class action lawsuit in the Wayne County Circuit Court . . . in which the Union/Labor Organization: (1) unlawfully purports to represent persons outside the defined bargaining unit; (2) is unlawfully coercing the Employer to deal with the Union/Labor Organization and affiliate locals acting on behalf of such persons, including retirees/former employees who when employed were exempt from union membership or members of other unlawfully recognized bargaining units; and (3) is coercing the Employer, without negotiation or agreement, to involuntarily subsidize supplemental life insurance for retirees. The lawsuit was filed on April 2007, and is ongoing.

Without scheduling arguments or a hearing, the ALJ issued a show cause order, directing the county to show cause why the charges should not be dismissed for failure to state a claim upon which relief could be granted. The county responded and the ALJ issued his decision and recommendation in December 2008. He concluded that the county's charges failed to state a claim under the PERA and recommended dismissal. In its November 2009 decision, the MERC agreed with the ALJ and dismissed the county's ULP charges.

On appeal, the county argues that the MERC improperly relied on four "factual premises" in determining that the county's ULP charges failed to state a claim upon which relief could be granted and that the MERC erred in concluding that the ULP charges amounted to an improper collateral attack on the circuit court action.

The four "factual premises" challenged by the county are:

> 1. While AFSCME was a named party in the Class action, it was not the class representative.

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[1] The circuit court ultimately ruled in favor of the plaintiffs, ordering the defendants to make SLI available for purchase by the plaintiffs under the former, flat-rate premium structure, but this Court reversed and remanded for entry of an order permitting the defendants to change to an age-rated SLI premium structure. The panel concluded that "there was no express contractual right or past practice that amended the collective bargaining agreement to provide a right to a flat-rate premium structure in perpetuity and, therefore, nothing that could have vested." Because there was no vested right, the defendants could modify the rate structure without the plaintiffs' consent. *Butler v Wayne County*, ____ Mich App ____; ____ NW2d ____ (2010), slip op, p 12.

2. AFSCME has an interest in the outcome of the litigation over the amount of insurance premium paid by retirees since AFSCME bargained for and entered the contract providing for insurance.

3. In actions to enforce the collective bargaining agreement, AFSCME may certainly represent those retirees who gave their consent.

4. Retirees may, with or without union assistance, take action on their own to pursue the enforcement of their contractual rights under the collective bargaining agreement.

However, we need not address the county's challenge to these "findings" because the county's objections to each of the four "factual premises" are moot.

Appellate courts will sua sponte refuse to decide moot cases. *In re MCI Telecom Complaint*, 460 Mich 396, 434 n 13; 596 NW2d 164 (1999), citing *Ideal Furnace Co v Int'l Molders' Union of North America*, 204 Mich 311; 169 NW 946 (1918). Mootness is a preliminary issue that a court addresses before it reaches the merits of the case. *Id.* A case is moot when it involves "nothing but abstract questions of law, which do not rest upon existing facts or rights." *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920). In addition, "[a]n issue is moot if an event has occurred which renders it impossible for the court to grant relief," or "when a judgment, if entered, cannot have, for any reason, any practical legal effect on the existing controversy." *Gen Motors Corp v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ____ (2010), slip op, p 15, 16.

The county's arguments pertain to the propriety of respondents' alleged representation, in the circuit court action, of a class that included retirees who had never been covered under the AFSCME collective bargaining agreement and who did not consent to representation by respondents. These arguments are moot in light of the circuit court's orders of April 10, 2008, and May 16, 2008, which removed respondents as parties to the circuit court action, limited the class to "those retired members of AFSCME Council 25, and its Locals 25, 101, 409 and 1659 who have purchased SLI," and amended an existing preliminary injunction to apply only to that class. There is no question that, since at least April 10, 2008, respondents were not the class representatives. The county essentially acknowledges that this whole line of argument is moot when it points out, in its brief on appeal, that "during the course of the litigation the County actually proved its position on this point and secured court orders narrowing the class and modifying the preliminary injunction to only include AFSCME members." Accordingly, the arguments on appeal do not rest upon existing facts and it is unclear what practical legal effect a decision by this Court to remand to the MERC could have.

The county also argues on appeal that the MERC erred in concluding that the county's ULP charges were an improper collateral attack on the circuit court action. Citing *BE & K Const Co v NLRB*, 536 US 516; 122 S Ct 2390; 153 L Ed 2d 499 (2002), and *Bill Johnson's Restaurants, Inc v NLRB*, 461 US 731; 103 S Ct 2161; 76 L Ed 2d 277 (1983), the county argues that "it has been recognized that[,] in an exceptional case, a party's conduct in bringing litigation may give rise to an actionable ULP charge." In *Bill Johnson's*, 461 US at 748-749, the Court held that the National Labor Relations Board (NLRB) "may not halt the prosecution of a state-

court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." In *BE & K*, 536 US at 529-530, 536-537, the Court held that the NLRB may not declare that an unsuccessful but reasonably based lawsuit filed with a retaliatory purpose violates the National Labor Relations Act. *Id*. at, 563-537. The Court declined to "decide what our dicta in *Bill Johnson's* may have meant by 'retaliation.'" *Id*. at 537.

In this case, the county fails to allege that the plaintiff's lawsuit lacked a reasonable basis. In its reply brief, the county impliedly argues that it need not allege that the circuit court action lacked a reasonable basis because respondents were using the lawsuit to repudiate a contract by seeking to "confer AFSCME contract benefits on persons never covered an AFSCME contract." This repudiation argument is another permutation of the county's argument concerning respondents' purported representation of non-union, individual plaintiffs in the class action, and does not establish that the filing and pursuit of the circuit court action was, in itself, an unfair labor practice. In any event, this argument is also moot because it is unclear what relief we could grant the county at this stage. Throughout the MERC proceedings, the only relief the county sought was an order directing respondents to cease and desist from the alleged unfair labor practices—that is, from their conduct of the circuit court proceedings. Respondents have already "ceased and desisted" from the conduct complained of because they are no longer part of the circuit court action. Consequently, a remand to the MERC for further proceedings would be futile.

The county, relying on *Smith v Lansing School Dist*, 428 Mich 248; 406 NW2d 825 (1987), contends that a remand to the MERC is required because the county was not afforded the opportunity to present an oral argument in opposing summary disposition. In *Smith*, the Court held that "the MERC has the procedural authority to dismiss an unfair labor practice charge for failure to state a claim, consistent with the PERA, the MAPA, and its own administrative rules." *Id*. at 250. It further held that, although the parties to a MERC proceeding must only be given the opportunity to present evidence on issues of fact when issues of fact exist, they must be afforded an opportunity to present oral arguments on issues of law and policy. *Id*. at 251, 257-259.

We conclude that this argument is not preserved for appeal because, although the county requested an evidentiary hearing, it failed to request an oral argument before an ALJ or the MERC. See *Goolsby v City of Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984) ("[T]hat issue has not been preserved for appeal because plaintiffs did not raise it before the MERC . . . ."). Although an appellate court may disregard preservation rules, *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95-96; 693 NW2d 170 (2005), we decline to do so here in light of the mootness of the county's ULP charges.

Finally, although respondents' brief on appeal requests damages for having to defend a vexatious appeal, they did not file the required motion under MCR 7.211(C)(8). We have nevertheless considered the issue and have concluded that the appeal was not vexatious and therefore decline to award sanctions under MCR 7.216(C).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot